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OCT 11 1960
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No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1960

CITIZENS UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion and order of The Federal Power Commission (R.[1] 1738–1755) is reported at 21 F.P.C. 233. The opinion of the Court of Appeals (Pet. App. 3a–7a) is reported at 279 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1960 (Pet. App. 8a). Petitioner's timely petition for rehearing was denied on June 13, 1960. The petition for a writ of certiorari was filed on Sep-

[1] "R" refers to the folio citations in the joint appendix filed below.

tember 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that there was substantial evidence in the record to support the Commission's findings that the first mile of the Clyde River is navigable and that operation of petitioner's hydroelectric projects on the river and a tributary thereof would affect the interest of interstate or foreign commerce.

STATUTE INVOLVED

The applicable provisions of the Federal Power Act are set forth in petitioner's appendix at pp. 1a–2a.

STATEMENT

Petitioner commenced this proceeding in the court below on a petition under Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b), to review and set aside orders of the Federal Power Commission requiring petitioner to apply for a license for its hydroelectric project works on the Clyde River and one of its tributaries in northern Vermont. The proceedings held and facts determined may be summarized as follows:

1. *Proceedings prior to the Commission's determination.* In June 1956, petitioner commenced construction of certain project works (designated in the proceedings below as Unit No. 11) for water power development on the Clyde River, approximately one mile upstream from the point at which the Clyde flows into Lake Memphremagog near Newport, Ver-

mont. By letter dated September 11, 1956, the Commission informed petitioner that it had learned of the commencement of construction without the prior filing of a declaration of intention or an application for license pursuant to Section 23(b) of the Federal Power Act, 16 U.S.C. 817 (R. 1802). On November 30, 1956, petitioner filed the required declaration of intention to obtain a Commission determination whether its proposed construction of Unit No. 11, consisting of a diversion dam, an earth diversion canal at the south end of the dam, and a new power plant, all in addition to its other hydroelectric facilities on the Clyde River, would "affect the interests of interstate or foreign commerce." (R. 1473–1475.)

By order of June 24, 1957, the Commission instituted an investigation under Section 4(g) of the Act, 16 U.S.C. 797(g), to decide whether it was in the public interest to issue an order to conserve and utilize the water resources of the Clyde (R. 1493), thereby raising the issue, *inter alia*, whether the Clyde is a navigable water of the United States. After issuance of notice and the granting of intervention to various interested parties, hearings were held before a presiding examiner. On August 12, 1958, based on evidence adduced at these hearings, the presiding examiner issued a decision in which he found that Lake Memphremogog and the Clyde River, to a point about one mile upstream from its mouth, below Unit No. 11, were navigable and that the Clyde beyond the approximate one-mile point was not navigable (R. 1621–1623). He also found that the main-

tenance and operation of petitioner's Unit No. 11 and its Newport development about two miles from the river mouth affected the navigability of the river below Unit No. 11 and affected the interests of interstate or foreign commerce in that part of the stream (R. 1621).

2. *The Commission's findings.* Both sides filed exceptions to the presiding examiner's decision (R. 1644–1723). Upon review of the record and the briefs filed by the parties, the Commission found: (1) That the Clyde River was navigable from its mouth to a point near its source, and (2) that even if the Clyde was navigable only below Unit No. 11, as found by the examiner, all of petitioner's developments on the Clyde and a tributary thereof had "a substantial effect" on the navigability of that part of the stream and on the interests of interstate or foreign commerce (R. 1741, 1750–1751). Thus, it concluded that petitioner should be required to apply for a license for all of its project works on the Clyde and on a tributary (R. 1741, 1752).

These findings of the Commission were predicated on various subsidiary findings with regard to navigability of the entire river, including the one-mile portion below Unit No. 11, and as to the effect of petitioner's projects on this one-mile part. These findings may be briefly summarized as follows:

a. *The Clyde River.*—The Commission found that the Clyde River extended for some 28 miles through northeastern Vermont emptying into the southern end of Lake Memphremagog, a lake 30 miles long, lying both in Vermont and in Canada (R. 1742). The lake was clearly navigable, its water level being main-

tained in accordance with an agreement between the United States and Canada (R. 1742). The Commission traced the course of the Clyde, describing its flow at different points along its route, its links with several ponds and tributaries, and the various hydroelectric projects set up by petitioner along the river's course (R. 1742–1743).[2] It was noted that the river, in the one-mile section below Unit No. 11, was normally at the level of Lake Memphremagog (R. 1742).

b. *Navigability of the Clyde.*—i. *Boating:* The Commission found that the entire river was suitable for navigation by small boats, which used, with particular ease, that portion of the river below Unit No. 11 (R. 1745). These boats included row boats, canoes,

[2] The average discharge of the Clyde River at Newport, Vermont, is 248 cfs., with a flow in excess of 400 cfs. about 16.5% of the time (during the months of March through June) (R. 1074). The average flow of the East Fork of the Chippewa, the navigability of which was upheld in *State of Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334 (C.A. 7), certiorari denied, 348 U.S. 883, was about 240 cfs., and its flow exceeded 400 cfs. about 15% of the time. (See the Commission's brief in *State of Wisconsin, supra*, C.A. 7, No. 10948, April 1954, p. 4; compare, petition for writ of certiorari in *State of Wisconsin* v. *Federal Power Commission*, No. 373, October Term, 1954, p. 5).

The Clyde, which falls a total of 493 feet in 28 miles (R. 1372), is less precipitous than the Pigeon River, held to be a navigable water of the United States in *Pigeon River Improvement Co.* v. *Cox Co.*, 291 U.S. 138. The Pigeon River drops over 680 feet in the 20 miles nearest its mouth (House Document No. 92, 73d Cong., 1st Sess., p. 2).

[3] The Commission also found that the waters of the Clyde were inhabited by many varieties of fish and that Atlantic salmon used the river for spawning (R. 1742). The Commission found extensive damage to these fish by reason of petitioner's operation (R. 1750–1751) and its order required a minimum discharge to prevent recurrence of such damage (R. 1788).

and power boats up to 16 feet long (R. 1745, 1750). The boats had been utilized for pleasure or sport including fishing, hunting, and trapping (R. 1745).

ii. *Logging:* The Commission found that the record demonstrated a significant use of the Clyde for logging (R. 1745). The river had been the scene of frequent log drives, at least up to the year 1918 (R. 1746), and saw and pulp mills had been located along the river's banks (R. 1745–1746). The lower part of the Clyde had also been used for lumbering operations as, for example, when the farmers on the shores of Lake Memphremagog took their logs up the Clyde to the saw mills and returned with the sawed lumber (R. 1746). It was further found that transportation of pulp and logs on the Clyde to other States or to Canada through Lake Memphremagog had probably occurred (R. 1746, 1748). The Commission concluded that, even without improvement, the Clyde was suitable for such transportation (R. 1748).

iii. *Historical Usage:* The Commission took note of various maps and other historical documents introduced into evidence in finding that the Clyde had been used as a travel route in Colonial times between Canada and the English settlements in New England (R. 1746). The river had been suitable for use both by Indians and by Colonial fur traders and trappers (R. 1747, 1748).

iv. *Improvements:* The Commission found that in 1825, in connection with a survey of the Connecticut River, the Secretary of War had a study made of the possible development of a route from Lake Mem-

phremagog through the Clyde to the Connecticut River by means of a canal and improvements to existing waterways. Based on this study, he recommended to the Congress, within the bounds of reasonable expenditure, that such improvements be made (R. 1747–1748). The project, however, was not built (R. 1748). The Commission also found with regard to potential use of the Clyde at the present time, that, even without alteration, the existing traffic could be carried on between the Clyde and Lake Memphremagog (R. 1748).

c. Effect on interests of interstate or foreign commerce.—The Commission found that, by the operation of petitioner's various hydroelectric works on the Clyde and a tributary thereof, the navigable capacity of the river below Unit No. 11 was substantially affected (R. 1748–1749). Noting various examples of petitioner's ability to control the flow of the river for substantial periods of time, even to the extent of preventing all water from passing down the river for 48 hours, the Commission concluded that petitioner's operations had "a pronounced effect on stream flow" (R. 1749). With regard to that part of the river below Unit No. 11, the Commission expressly found that the operation of petitioner's projects upstream had "a substantial effect on the movement of boats" in that one-mile section of the stream, pointing, by way of example, to the effect on a 16-foot power boat which had been in that area (R. 1750). The Commission concluded that petitioner's operations would affect the interests of interstate or foreign commerce (R. 1751), and it required petitioner to file an application for license (R. 1752).

3. *The opinion below.* In its opinion, the court below (per Hand, J.), noting that, under 16 U.S.C. 825l(b), it was bound by the Commission's findings of fact if supported by substantial evidence, held that that part of the Clyde below Unit No. 11 was navigable and that petitioner's projects on the Clyde and a tributary thereof would substantially affect the navigability of this part of the stream and would thus affect the interests of interstate or foreign commerce. In so ruling, the court considered it unnecessary to reach the question of the navigability of the entire stream. But with regard to the question of navigability of the lower part of the stream under 16 U.S.C. 796(8) (Pet. App. 1a), upon review of the findings and underlying evidence, the court flatly concluded that there could be no doubt that this portion of the river was "navigable without change" (Pet. App. 6a). As to the effect of petitioner's projects on the navigability of the stream near the river mouth under 16 U.S.C. 817 (Pet. App. 1a–2a), the court, carefully noting the various examples of the effect created by petitioner's operations, held that petitioner's control of flow was not "so inconsiderable as to be beyond the scope of § 817" (Pet. 6a). Again, observing that the question was whether petitioner's projects affected navigability "enough" to give the Commission jurisdiction, the court answered this question in the affirmative (Pet. 6a–7a). Accordingly, it affirmed the order of the Commission requiring petitioner to file an application for license for all of its projects on the Clyde and a tributary thereof.

ARGUMENT

Petitioner's first argument is that, in determining the question of navigability of the lower part of the Clyde, the Commission and the court below misapplied certain criteria of navigability so as to create a conflict with other decisions. However, this argument is clearly devoid of merit. The indicia of navigability applied below have been similarly applied by this Court and other courts in numerous instances; petitioner's argument, in actuality, comes down to an assertion of lack of substantial evidence to support the findings, a question determined correctly below and plainly not presenting any necessity for review here. Petitioner's second argument, that the court below failed to find that petitioner's operations substantially affected the navigability of the lower part of the stream, is refuted by the opinion of the court making clear that this is exactly what it held. Consequently, there is no occasion for further review by this Court.

1. As petitioner properly points out (Pet. 7–8), the guiding standard for determining navigability of the whole or part of a stream is provided by Section 3(8) of the Federal Power Act, 16 U.S.C. 796(8) (Pet. App. 1a). That Section defines navigable waters of the United States, for purposes material here, as:

> * * * those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved

> condition * * * *are used or suitable for use* for the transportation of persons or property in interstate or foreign commerce, including therein * * * such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority. [Emphasis added.]

Petitioner also recognizes that the court below, in affirming the Commission's findings on navigability of the lower part of the stream as supported by substantial evidence, implicitly approved those findings (Pet. 9, 14) and the four criteria on which they were based (Pet. 10). Its argument is that these criteria of navigability were misapplied below, and that there was no substantial evidence to support certain of the findings. We think it plain that both these contentions are insubstantial.[4]

The Commission relied on four general categories of evidence to support its conclusion that the lower part of the Clyde was navigable: evidence indicating (1) boating activity, (2) historical use of the river,

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[4] Petitioner initially asserts that all the evidence before the Commission on navigability, or on what it calls the "commerce issue" (Pet. 9), applied to the navigability of the entire stream and not to any one part (Pet. 9). This is incorrect, as both the findings and record demonstrate. They deal expressly with different parts of the stream, and thus the court was able, as it did, to affirm as to the navigability of the lower part of the stream without dealing with this issue with regard to the river above Unit No. 11. Moreover, some of the evidence concerning commerce on the entire stream or improvement of the entire stream obviously supported findings limited to the first mile or any other part of the Clyde.

(3) logging activity, and (4) recommended improvement of the stream. See the Statement, *supra*, pp. 5–7. Obviously these four categories are not the sole bases for determining navigability since "[e]ach determination as to navigability must stand on its own facts" (*United States* v. *Utah*, 283 U.S. 64, 87), but these types of factor are properly to be taken into account. As this Court observed in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, at 404–406:

> The legal concept of navigability * * * is not to be determined by a formula which fits every type of stream under all circumstances and at all times.
>
> * * * * * *
>
> It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration.

Petitioner insists that even assuming there was evidence as to boating—which was certainly established in the record and findings, particularly with regard to the lower part of the Clyde—intrastate pleasure boating could not be utilized as a test of navigability (Pet 10). This contention ignores the statutory terms, *supra*, pp. 9–10, providing not only actual use but *suitability for use* as tests of navigability. The Commission concluded, in view of the extensive evidence of boating in the mile above Lake

Memphremagog, that there was no reason why such boating could not be carried on between the shores of Canada and this country (R. 1748); similarly, there was no reason why the established suitability for boating was restricted to small pleasure craft. As this Court has frequently reiterated, in terms applying to all four categories of evidence here, if there is any doubt of actual use, evidence of *suitability* for a particular use is sufficient under the Act to make a stream or a part thereof a navigable water. *E.g., The Montello,* 20 Wall 430, 441–443; *United States* v. *Utah,* 283 U.S. 64, 82–83; *Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 122–123; *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 416.[5]

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[5] See particularly *Appalachian Electric Power Co.* (311 U.S. at 416):

"* * * Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."

The language of the Court in the earlier case of *Leovy* v. *United States,* 177 U.S. 621, 633–634, repeatedly quoted by petitioner to create the notion that there is an absolute requirement that the commerce involved must be large and important and of "substantial and permanent character", must be read in the light of the facts of that case; which are far from equalling those of the instant case. Leovy involved Red Pass of the Mississippi River over which no commerce had been conducted. Cf. *United States* v. *Wishkah Boom Co.,* 136 Fed. 42, 48 (C.A. 9), appeal dismissed for want of jurisdiction, 202 U.S. 613. It is noteworthy that in the *Appalachian* case the Supreme Court reversed the court below which had cited *Leovy* as authority (107 F. 2d 769, 781 (C.A. 4)). Cf *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. 2d 155, 158 (C.A.D.C.), certiorari denied, 315 U.S. 806.

Petitioner's challenge to the evidence showing historical use (Pet. 11)—as indicating only the possibility of Indian voyages down the Clyde—is equally groundless. The evidence, consisting both of maps and historical documents, afforded a firm basis for the finding that the river had been suitable for general Colonial travel; and a finding of Colonial use, through maps and documents similar to those introduced here, has always been considered an indication of navigability. *E.g., The Montello, supra; United States* v. *Appalachian Electric Power Co., supra; United States* v. *Utah, supra; Montana Power Co.* v. *Federal Power Commission*, 185 F. 2d 491 (C.A.D.C.), certiorari denied, 340 U.S. 947; *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C.A. 5).

Petitioner's objections with regard to the findings on logging activity (Pet. 12–13) and recommended improvement of the Clyde (Pet. 13–14) are similarly lacking in merit. The assertion that there was no finding of interstate log transportation on the Clyde fails to take note of the finding, adequately supported by the record, that in the continuous logging activity along the Clyde (in the past), transportation to Canada through Lake Memphremagog probably occurred[6] (R. 1746, 1748). More important, of course, is the fact that, even if there was a finding establishing the lack of actual interstate log transportation, it would be of no account as long as the Commission

[6] This finding was supported by the subsidiary finding that farmers from the shores of the Lake took their logs up the Clyde to saw mills in Vermont and returned with the cut lumber (R. 1746).

finds, as it has here (R. 1748), that the Clyde, in its link with Lake Memphremagog, is suitable for such transportation.

As for improvement of the river, all that is required under Section 3(8) of the Act as an indication of navigability is a recommendation to Congress, whether approved or not, that such improvement take place. That is what happened here in 1825 when the Secretary of War, on the basis of a study of a water route from Canada to the Connecticut River, recommended that the Clyde be improved (R. 1747–1748). Petitioner's only objection to this evidentiary factor is that the recommended improvement of the Clyde involved a "man-made, artificial canal" above the first mile (Pet. 14). This Court answered this objection when it ruled in *United States* v. *Cress*, 243 U.S. 316, 326, that certain rivers "remained navigable waters of the United States * * * notwithstanding the artificial character of the improvements" made which rendered the rivers there, in effect, "artificial canals instead of natural waterways". See also *The Robert W. Parsons*, 191 U.S. 17, 26–27.

In sum, the criteria and evidence considered by the Commission were properly used and appraised by both the Commission and the court below. At most, petitioner differs with the Commission as to the weight to be accorded the particular evidence in this record, not on any unsettled general issue of law.

2. Petitioner completely misconstrues the holding below when it asserts that the court failed to find that its hydroelectric operations in the parts of the

Clyde and a tributary thereof which may be non-navigable had a substantial effect on the navigability of the first mile of the stream, and that the court was therefore ruling that *any* effect on navigability by hydroelectric units located on the upper parts of a stream is sufficient to require licensing under 16 U.S.C. 817 (Pet. 15–18).

It should be noted, initially, that the court was reviewing, and by its action affirming, findings of the Commission that petitioner's operations had a "pronounced effect on stream flow" (R. 1749) and "a substantial effect" on the movement of boats (R. 1750) in the lower part of the river. Moreover, the court explained in some detail certain of the evidence showing the significant effect on the navigability of the lower part of the river as a result of the normal operation of petitioner's hydroelectric works (Pet. App. 5a–6a). To put the matter beyond cavil, the court expressly held that the effect was not "so inconsiderable as to be beyond the scope of §817" (Pet. App. 6a) and that petitioner's operations affected the flow of this navigable portion of the Clyde "enough to give the Commission jurisdiction over the granting of a license" (Pet. App. 6a). Finally, the court analogized the situation here with regard to the question of effect to that in *Georgia Power Company* v *Federal Power Commission*, 152 F. 2d 908 (C.A. 5).

The court's statement that it did not have to determine *exactly* how much variation in navigability caused by petitioner's operations is necessary to justify intervention by the Commission (Pet. App. 7a) in no way contradicts the finding of a *substantial* effect on navigation.

where the Fifth Circuit unequivocally found substantial effect on navigability as a result of the hydroelectric operations there involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1960.

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